Supreme Court, U.S.
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No. 85-1428

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

NATIVE VILLAGE OF STEVENS

Petitioners,

vs.

ROBERT SMITH, in his official capacity as the Commissioner of Health & Human Services, WILLIAM SHEFFIELD, in his official capacity as Governor of the State of Alaska, and the STATE OF ALASKA

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 22, 1986

QUESTION PRESENTED

Whether the State of Alaska may exclude from its Aid to Families with Dependent Children program Indian children in tribal foster care because it refuses to coordinate its AFDC-FC program with a federally funded tribal foster care program?

PARTIES TO THE PROCEEDING

Petitioner is the Native Village of Stevens, an Alaskan Indian Tribe organized under the Indian Reorganization Act (25 USCA §476). Respondents are Robert Smith, Commissioner of the Alaska State Department of Health and Human Services; William Sheffield, Governor of the State of Alaska; and the State of Alaska.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Petitioners, the Native Village of Stevens, Alaska respectfully pray this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in Native Village of Stevens vs Robert Smith, et. al., No. 84-4431, entered on September 12, 1985.

OPINIONS BELOW

The opinion and decision of the United States District Court for the District of Alaska in Native Village of Stevens v Smith, et. al., Cir. No. F84-0003 (November 14, 1985) is attached to this petition as Appendix A. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at Native Village of Stevens v Smith, 770 F.2d 1486 (9th Cir. 1985) and is attached to the petition in Appendix B. The order denying rehearing dated

October 24, 1985 is also contained in Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on September 12, 1985. A timely petition for rehearing was filed and denied on October 24, 1985. Jurisdiction of this Court to review the Court of Appeals judgment in this case by writ of certiorari is established under 28 USC §1254. This petition for writ of certiorari is filed within the 90 day period prescribed by 28 USC §2101(c) as computed in accordance with Rules 20 and 29(1) of the Rules of the Supreme Court of the United States.

STATUTES TO BE CONSTRUED

The decision below construed Part E of Subchapter IV of the Social Security Act (42 USC §671-672) and portions of

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the Indian Child Welfare Act [25 USC §§1911(d), 1919, and 1931(b)].

STATEMENT OF THE CASE

Alaska, like most states, participates in the federally sponsored and federally funded Aid to Families with Dependent Children - Foster Care (AFDC-FC) program established under Title IV-E of the Social Security Act. [42 USC 670 et. seq.]. That program provides federal subsidies for foster care of children in protective custody because of abuse or neglect. The Act requires that participating states operate their AFDC-FC programs under a State plan which meets the standards established under that statute. One such requirement is that the State coordinates operation of the AFDC-FC program with other programs assisted under the Social

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Security Act or "other appropriate provision of federal law".

The Native Village of Stevens is an Athabascan Indian tribe located along the Yukon River in Interior Alaska. The tribe, through its consortium agency, Tanana Chiefs Conference, Inc., contracts for the operation of Bureau of Indian Affairs social services and operated a program under Title II of the Indian Child Welfare Act 25 USC 1901 et. seq. These include federally funded programs providing foster care for Indian children. The BIA programs operated by the tribe, however, are limited to providing supplemental assistance where other resources are not available to the child.

In exercising its tribal self-governing powers over children in need of aid, the tribe has assumed protective custody of tribal Indian children,

including T. O., a young Athabascan boy. Like other children in protective custody, T. O. was placed by the tribe in foster care. In T. O.'s case, however, the tribe suspected that T. O. was eligible for assistance under the Aid to Families with Dependent Children programs (AFDC) established under the Social Security Act. Consequently, the tribe, through its social service consortium agency, Tanana Chiefs Conference, Inc. sought foster care payments to T. O.'s foster family from the State on behalf of T. O. The State refused, stating that as a matter of policy, it does not pay for foster care ordered by tribal courts, arranged by other social service agencies or for children committed to the custody of other agencies. The tribe brought suit for a declaratory judgment that foster homes licensed or approved by the tribe are equivalent to

State licensed foster homes for purposes of qualifying for foster care maintenance payments under the Social Security Act, and that AFDC foster care payments shall be made by the State irrespective of the fact that foster care placement is made under tribal authority.

On cross motions for summary judgment, the District Court denied the tribe's motion and granted the State's motion dismissing the complaint, and reasoned that:

(1) the Social Security Act does not require the State to recognize village determinations of eligibility;

(2) the State is not required to enter agreements for foster care with tribes, and could not enter into such agreements because it lacks enabling legislation; and,

(3) the State is not required to render full faith and credit to tribal decisions on eligibility.

The tribe appealed, and the Ninth Circuit ruled that tribal foster care fulfilled all the requirements of eligibility for AFDC foster care, except that contained in 42 USC 672(a)(2) which requires that a child's placement be the responsibility of a state agency or a public agency with whom the State has an agreement. The Court found that while the State and tribe could enter into an agreement sufficient to qualify tribal foster care for AFDC foster care payments, neither the Social Security Act nor the Indian Child Welfare Act required the State to enter into such agreements.

REASONS FOR GRANTING WRIT

I. The Decision of the Ninth Circuit that the Provisions of 42 USC

671(a) are Permissive Conflicts with the Holding of the First Circuit's Decision in Lynch v Dukakis.

The holding of the Ninth Circuit in this case is in direct conflict with the holding of the First Circuit Court of Appeals in Lynch v Dukakis, 719 F.2d 504 (1st Cir. 1983). In that case, the First Circuit Court of Appeals held that 42 USC 671(a) established program requirements which are mandatory upon states participating in the Title IV-E programs under the Social Security Act, and that such requirements are enforceable through private enforcement actions. In Stevens Village v Smith, 770 F.2d 1486 (9th Cir. 1985), the Ninth Circuit Court of Appeals held that the requirements under this section are not mandatory and are not enforceable through tribal enforcement actions.

Title IV-E of the Social Security Act establishes a cooperative federal-state program which provides foster care maintenance payments for children who are in protective foster care, and eligible for Aid to Families with Dependent Children (AFDC). As noted by the 9th Circuit, the State's participation in the program is optional, however, those states which desire to take advantage of the substantial federal funds available through the program are subject to the requirements established under the Act. King v Smith, 392 U.S. 309, 316, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968). Chief among the federal requirements of Title IV-E is the necessity of the State to establish a plan which must comply with several requirements. id. Those requirements are set forth at 42 USC §671(a), and are the subject of

controversy in both this case and in Lynch v Dukakis, 719 F.2d 504 (1st Cir. 1983). The relevant statue provides that:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which ...
>
> (4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with programs at the State or local level assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of federal law;- ...and
>
> (16) provides for the development of a case plan...for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 675(5)(B) of this title with respect to each such child.

42USC §671(a).

In Lynch v Dukakis, 719 F.2d 504 (1st Cir. 1983), the Court considered clause 16 which requires case plans and a review system for children in protective foster care. The Court of Appeals upheld a lower Court's order that the State of Massachusetts develop the case plans and review systems required by this §671(a). That section was held to be mandatory upon the states. Moreover, the Court held that while the Secretary of DHHS could withhold funds under Title IV-E from states for noncompliance, the requirements could be enforced through private causes of action. 719 F.2d, at 509-512.

In contrast, the Ninth Circuit in Native Village of Stevens v Smith, 770 F.2d 1486 (9th Cir. 1985) held that clause 4 of section 671(a), which requires States to coordinate Title IV-E programs with other federally assisted

foster care programs (such as the tribes), are "not cast in mandatory terms", but are permissive. 770 F.2d at 1489. Moreover, the Court noted that the primary remedy in this case is either for DHHS to withhold federal funding or resort to Congress. id, at 1489-1490.

The conflict between the two cases could not be more striking. Essentially, the Ninth Circuit held that Sec. 671(a) is permissive and unenforceable while the First Circuit held that the same section is mandatory and enforceable.

The requirements contained in clauses 4 and 16 are part of the same sentence. Both are subject to the same preface which states that compliance is necessary "in order for a state to receive payments under this part". Moreover, clause 4, - found permissive

by the Ninth Circuit - reiterates its mandatory intent with the use of the word "shall", while such reiteration is absent from clause 16, which was found mandatory by the First Circuit. Clearly, the two Circuits are in conflict and in need of reconciliation by this Court.

II. The Decision of the Ninth Circuit is in Conflict with Miller v Youakim.

The holding of the Ninth Circuit conflicts with the holding of this Court in Miller v Youakim, 440 U.S. 125, 59 L. Ed. 2d 194, 99 S. Ct. 957 (1979) in two respects. In that case, this Court (1) enunciated a rule of statutory interpretation against implicit exclusion of children who qualify as "dependent children", and (2) ruled that the terms of the AFDC-FC legislation are mandatory upon the states unless Congress

expressly indicates that they are permissive. The Ninth Circuit decision in Stevens Village v Smith conflicts with this Court's holding in Miller v Youakim.

(A) The Ninth Circuit Decision Conflicts with the Rule of Statutory Interpretation Against Implicit Exclusion of Children Who Qualify as "Dependent Children" Enunciated in Miller v Youakim.

In Miller v Youakim, supra, this Court held that the denial of AFDC-FC benefits from otherwise eligible children merely because they are placed with relatives was impermissible. Generally, the AFDC-FC program requires placement of the child in a home which is either state licensed or fulfills state license standards. In the Miller v Youakim case, the foster home in which the

eligible children were placed was not a state licensed home because state licensure standards did not permit foster care licensure of relatives. Thus, while the home met all other standards for a foster care license, it did not meet all state licensure standards because the foster parents were related to the placed children.

In holding that the State could not exclude a relative placement, this Court stated

> Congress has specified that programs like AFDC-FC, which employ the term "dependent child" to define eligibility must be available for all eligible individuals. ... Section 408(e) reinforces this general rule by requiring States to provide Foster Care benefits to "any" child who satisfies the federal eligibility criteria of Sec. 408(e).

440 U.S., at 134. Supporting this conclusion, the Court pointed to Congress' "overriding goal of providing the

best available care for all dependent children removed from thier homes because they were neglected." id, at 139. Based upon these considerations, the Court stated that

> ...the statute plainly states that a foster family home is the home of any individual licensed or approved by the State as meeting its licensing requirements, and we are unpersuaded that the provision on which appellants rely implicitly limit that expansive definition....

id, at 137-138.

Thus, this Court in Miller v Youakim enunciated a rule of statutory interpretation with respect to the AFDC-FC legislation which strongly disfavors implicit exclusion of children otherwise eligible for AFDC-FC benefits.

In the Stevens Village case, however, the Court of Appeals failed to apply these rules. Rather, in Stevens Village, the Ninth Circuit allowed the State to exclude children in protective

foster care merely because the State refused to enter into a coordination agreement with the child's tribe. States cannot errect exclusive policies which are designed to frustrate Congress' inclusive policies and exclude children who were plainly intended to be beneficiaries by the program. Just as the State cannot define "foster family" in its license standards to exclude children placed with relatives, so the State cannot refuse to coordinate services with another federally assisted program and thereby deny benefits to otherwise eligible children.

Comparing the two cases, Congress' policies respecting coordination of services are especially clear. In Miller, the AFDC-FC statutes did not establish federal guidelines for State foster care license standards. Title IV, however, does establish minimum

standards for foster care coordination. Specifically, 42 USC 671 mandates coordination between the State and other federally assisted foster care programs.

Additionally, the Ninth Circuit ignored the recent expression of Congressional policy embodied in the Indian Child Welfare Act. Specifically, 25 USCA 1931(b) provides that

> For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

Given that the AFDC-FC program is the primary federal assistance for foster care programs, this section could only be construed to express a Congressional policy to include - not exclude - tribal foster care within the AFDC-FC program.

In fact, this section of ICWA merely confirms the pre-ICWA administrative interpretations of the DHHS. Agency regulations specifically include tribal foster care as eligible for assistance.

The administrative interpretation of DHHS clearly includes tribally placed children in tribal foster care as inclusive of the term "foster family". Specifically, 45 CFR 1355.20 defines "foster family" home to mean

> ....the home of an individual or family licensed or approved by the State licensing or approval authorities (or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authorities), ... (emphasis added.)

Additionally, the HEW has historically held that AFDC-FC is available to dependent children placed in foster care under a tribal court order. State

Letter No. 1062, Dept. of Health, Education & Welfare (See Appendix C)[1]

Clearly the Ninth Circuit did not apply the rule against implicit exclusion enunciated in Miller v Youakim. Congressional policies mandating coordination of services with federal (tribal) programs, and specific Congressional enactments to include tribal foster care, supported by consistent administrative interpretations clearly support inclusion of tribal foster care. Miller v Youakim stands for the proposition that given these factors, States are mandated to provide AFDC-FC unless Congress expressly makes such assistance permissive.

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[1] State letters by HEW have generally defined the administrative interpretation of the statute. See King v Smith, 392 U.S., at 323 n 9.

Therefore, a substantial conflict exists between the Ninth Circuit holding in Stevens Village and the holding of this Court.

(B) The Ninth Circuit Decision Conflicts with the Rule Enunciated in Miller v Youakim that the Terms of the AFDC-FC Legislation are Mandatory Unless Otherwise Expressly Provided by Congress.

As noted above, the Ninth Circuit found that foster care coordination agreements between the State AFDC-FC programs and other agencies operating federally assisted foster care programs were permissive not mandatory. The Court noted that States failing to comply with the mandatory provisions of the Act face the loss of federal funds. The Court stated that "When Congress

wishes to compel action by a State, it does not hesitate to do so." 770. F.2d, at 1489.[2] Clearly, the Ninth Circuit held that the terms of AFDC-FC are permissive unless Congress specifically indicates they are mandatory. The Court of Appeals went on to state:

> In contrast, neither 42 USC §671(a)(4) nor 25 USC §1919(a) require states and tribes to enter into foster care agreements under section 672(a)(2)(B). <u>These statutes are not cast in mandatory terms. It may be more consonant with the statutory spirit to undertake such an agreement, but Congress did not provide that a state or a tribe has the right to force an agreement upon the other.</u>

<u>id</u>. (emphasis added.)

Oddly enough, the Court of Appeals found that the statutes evince a Congressional intent favoring coordination agreements between State administered

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[2] As noted above, the lack of coordination agreements is, in fact, a precondition to the receipt of federal AFDC-FC subsidies. 42 USC 671(a).

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AFDC-FC programs and other federally assisted foster care programs, such as the tribes. Nevertheless, the ruling permits States to deny foster care payments to an otherwise eligible Indian child based upon the State's frustration of that Congressional policy. While such a rationale is obviously inconsistent, it also conflicts with the holding of the Court in Miller v Youakim.

This Court in Miller v Youakim held that

> A participating State may not deny assistance to persons who meet eligibility standards defined in the Social Security Act unless Congress clearly has indicated that the standards are permissive.

440 U.S., at 133.

The rationale employed by this Court in reaching that decision lies in this Court's examination of the Congressional goals sought to be implemented by the AFDC-FC program. In Miller v

Youakim, this Court looked past the intrinsic language of the statute to examine the legislative history and structure of the Act to determine the goal Congress sought to accomplish in authorizing the program. 440 U.S., at 138. While clearly the States retain substantial discretion in operation of the program, the Court held that in order to accomplish the Congressional goal of care for abused and neglected children in foster care as Congress intended, the terms of the AFDC-FC legislation must be construed as mandatory upon the participating states unless Congress explicitly holds otherwise.

While the Ninth Circuit correctly held that Congress authorized coordinating agreements and that such agreements were consonant with the statutory "spirit" of the Act, the Court of

Appeals departed from Miller v Youakim in finding that such agreements are permissive absent express mandatory language. Once the Ninth Circuit found that Congress authorized the agreements and that they fulfill the intended Congressional goal of coordination of federally assisted programs, the Miller v Youakim analysis properly holds that such agreements are mandatory unless Congress expressly indicates that they are merely permissive.[3] Simply put, the Miller v Youakim approach makes common sense: if a Court finds that Congress authorized the coordination agreements, and that Congress intended the states to

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3 The Court of Appeals correctly held that §109 of the Indian Child Welfare Act [25 USCA §1919(a)] does not require tribal-state agreements. Nonetheless, the ICWA does clarify the legitimacy of such agreements as a reflection of Congressional policy respecting implementation of the U.S. trust obligation toward tribal children. See 25 USC 1901(3).

enter into them, then the coordination agreements ought to be mandatory unless Congress expressly provides otherwise. The analytical approach adopted by the Ninth Circuit represents a total reversal of the Miller v Youakim approach. It is, therefore, necessary to correct the judgment of the Court of Appeals to more accurately reflect the approach enunciated in Miller v Youakim.

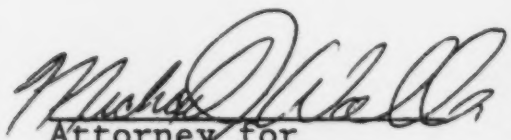
CONCLUSION

This case presents fundamental questions regarding the relationship of tribal foster care and State policies which seek to exclude benefits to dependent Indian children when tribes take action to protect their children. Moreover, the case presents fundamental questions repecting the ability to Congress to demand coordination of

federal programs operated by tribes and states. As noted above, the Ninth Circuit opinion allows states to exclude benefits to Indian children in tribal foster care and ignore the common sense demand of Congress that federal programs be coordinated. The petitioner respectfully requests the Court to issue a writ of certiorari to allow review of this decision.

Respectfully submitted this 22nd day of January, 1986.

MICHAEL J. WALLERI



Attorney for
Petitioner, Native
Village of Stevens.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF STEVENS, Plaintiff vs. ROBERT SMITH, in his official capacity as the Commissioner of Health & Human Services, WILLIAM SHEFFIELD, in his official capacity as the Governor of the State of Alaska, and the STATE OF ALASKA, Defendants.	F84-0003 Civil ORDER

The Plaintiff, Native Village of Stevens, assumed custody of one of its children, removed him from his home, put him in a foster home and sought funds from the State of Alaska to make foster care maintenance payments. The Alaska Division of Family & Youth Services of the Alaska Department of Health & Human Services participates in a federally assisted foster care program transfer payments authorized by the Adoption Assistance & Child Welfare Act of 1980

(referred to by both parties as the "Social Security Act"), PL 96-272, codified at 42 USC §§670-676. The State of Alaska has concluded a plan with the Secretary of Health and Human Services pursuant to 42 USC §671. The Tanana Chiefs Conference on behalf of the Village of Stevens requested payments pursuant to the above-stated Adoption Assistance and Child Welfare Act and pursuant to the Indian Child Welfare Act of 1978, PL 95-608, codified at 25 USC §§1901-1966. Defendant State of Alaska denied the request for foster care benefits because the child in tribal protective custody was placed there under tribal authority rather than state authority.

Plaintiff filed a complaint in this Court seeking a declaratory judgment that foster homes licensed or approved by the Native Village of Stevens shall

be equivalent to licensing by the State of Alaska for the purpose of qualifying for assistance from such programs. Plaintiff also sought a declaration that payments under 42 USC §672 shall be made irrespective of the fact that the foster care placement is made by tribal authority. Plaintiff moved for summary judgment; defendants opposed the motion and moved for summary judgment.

Plans concluded with the Secretary of Health and Human services pursuant to 42 USC § 671 obligate participating states to administer or supervise administration of the plan. The plan concluded by the State of Alaska with the Secretary obligates the state to establish an agency which is to make determinations of eligibility. The agency which makes determinations of eligibility, the Division of Family & Youth Services, noted that "the Division

does not pay for foster care for children committed to the custody of any other agency, or ordered by any other state's court or a tribal court, or arranged for by any other social services agency."

Plaintiff Village of Stevens notes that, pursuant to 42 USC § 671(a)(4), the State of Alaska is obligated to assure that the programs at the local level under Part E will be coordinated with the programs at the state or local level assisted under Parts A and B of the Social Security Act. 42 USC §§ 601-615 and 42 USC §§ 620-628. Plaintiff further contends that this subsection requires the State of Alaska to recognize the Village's determinations of eligibility. Nothing in the Act, the legislative history or the case law requires the State of Alaska to recognize the Village's determinations of

eligibility. 1980 U.S. Code Cong. & Ad. News 1448.

Plaintiff further alleges that 25 USC § 1919 of the Indian Child Welfare Act requires the State of Alaska to conclude an agreement with the Village. The statute and the legislative history state clearly that these agreements are voluntary. 1978 U.S. Code Cong. & Ad. News 7530, 7547. The State of Alaska has not passed any enabling legislation which would allow the Division of Family & Youth Services to negotiate any agreement pursuant to 25 USC § 1919.

Plaintiff finally alleges that 25 USC § 1931(b) requires the State of Alaska to grant full faith and credit to the Village's determinations of eligibility for purposes of funding eligibility under the Adoption Assistance and Child Welfare Act. There is no evidence in either act or in either legislative

history or in the interrelationships of the two acts to suggest that Section 1931(b) of the Indian Child Welfare Act is to govern the Adoption Assistance and Child Welfare Act. 1978 U.S. Code Cong. & Ad. News 7530, 7549. This subsection, moreover, appears to command the federal government to grant full faith and credit to Indian tribal decisions; this provision does not appear to command the various states to accord full faith and credit to Indian tribal decisions.

For these reasons, the Plaintiff's motion for summary judgment is DENIED, and Defendants' motion for summary judgment is GRANTED. The Clerk of Court shall enter judgment dismissing Plaintiff's complaint.

Dated at Anchorage, Alaska, this 8th day of November, 1984.

/S/

United States District Court Judge

cc: Michael J. Walleri, Esq.
D. Rebecca Snow, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF STEVENS, Plaintiff-Appellant vs. ROBERT SMITH, in his official capacity as the Commissioner of Health & Human Services, WILLIAM SHEFFIELD, in his official capacity as the Governor of the State of Alaska, and the STATE OF ALASKA, Defendants-Appellees.	#84-4431 D.C. #CV F84-0003 OPINION

Appeal from the United States District Court for the District of Alaska
Honorable H. Russel Holland
Presiding

Argued & Submitted: 8/6/85
Anchorage, Alaska

Before: WRIGHT, Senior Circuit Judge,

and POOLE & HALL, Circuit Judges

POOLE, Circuit Judge:

Appellant Native Village of Stevens (Stevens) sued the Governor of Alaska, the Alaska Commissioner of Health & Social Services and the State of Alaska after Alaska refused to pay foster care

maintenance for a child belonging to Stevens. Stevens sought a declaratory judgment that tribally approved foster homes are equivalent to State licensed foster homes for purposes of receiving funds from federally assisted foster care programs, and that the State should make foster care payments under 42 USC § 672 regardless of the fact that foster care placement is arranged by tribal authority. The district court granted the State's cross-motion for summary judgment and dismissed Stevens' complaint. For reasons set forth below, we affirm.

Stevens is an Athabascan Indian tribe. The Tanana Chiefs Conference (Tanana) is a tribal consortium which contracts on behalf of Stevens and other Athabascan Villages for the provision of social service programs, including foster care, for Indian children. On

August 10, 1983, a member of Stevens, T.O., was taken into tribal custody by order of the tribal council. With Tanana's assistance, the council placed T.O. with another Athabascan family. The foster home in which he was placed was not licensed by the State for foster care.

Tanana, on behalf of Stevens, later sought foster care payments from the State on behalf of T.O. The State refused, asserting that it does not pay for foster care ordered by tribal courts, arranged by other social services agencies, or for children committed to the custody of other agencies. Stevens brought its suit for declaratory relief shortly thereafter.

The District Court held that Alaska need not recognize Stevens' determinations of eligibility for foster care, that the Indian Child Welfare Act does

not require Alaska to reach an agreement concerning foster care with the tribe and that the State need not grant full faith and credit to the tribe's eligibility determinations.

Standard of Review

The standards of review in this case is de novo, since we are reviewing a grant of summary judgment, Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985), and an issue of statutory construction is involved. Dumdeang v. CIR, 739 F.2d 452, 453 (9th Cir. 1984).

The Foster Care Program

Part E of Subchapter IV in Title 42 (Title IV-E) sets forth a federally funded foster care and adoption assistance program. Part E is but one part of Subchapter IV, which establishes the Aid to Families with Dependent Children program. See generally S. Rep. No. 336, 96th Cong., 2d Sess. 10, reprinted in,

1980 U.S. Code Cong. & Ad. News 1448, 1459. The AFDC program is based upon cooperative federalism - states are not obligated to participate, but if they choose to do so and receive federal funds, they must conform to the requirements of the Social Security Act. King v. Smith, 392 U.S. 309, 316-17 (1968). Alaska participates in Title IV-E, and it is therefore obligated under 42 USC § 672 to make foster care maintenance payments for dependent children eligible for AFDC.[1]

---

[1] According to 42 USC § 672, states shall make foster care maintenance payments with respect to children who would meet the requirements of sections 606(a) or 607. Sections 606(a) and 607 define the term "dependent child" for purposes of receiving AFDC benefits. The State notes that it has never determined whether T.O. is a "dependent child" under 42 USC §§ 606(a) or 607 and eligible for foster care maintenance. This is not a material factual issue rendering summary

(Footnote Continued)

Congress has established several requirements which must be met before a state is obligated to make foster care payments on behalf of an eligible child:

> (1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child * * *
> (2) such child's placement and care are the responsibility of (A) the State agency administering the State plan * * * or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect;
> (3) such child has been placed in a foster family home or child care institution * * *
>
> * * * *

(Footnote Continued)
judgment inappropriate, since the State's policy would deny foster care to Indian children placed by a tribe regardless of AFDC eligibility.

42 USC § 672(a). The statute defines both "foster family home" and "child care institution" as institutions licensed by a state. 42 USC § 672(c). In evaluating Stevens' claim that Alaska should make foster care payments on T.O.'s behalf, we must consider whether the requirements of section 672 have been met.

a. Removal from the home

T.O. was removed from his home after the tribal council decided it would be in his best interests, and taken into tribal custody. Under section 101(d) of the Indian Child Welfare Act, states are to give full faith and credit to the public acts, records and judicial proceedings of Indian tribes applicable to Indian child custody proceedings. 25 USC § 1911(d). Therefore, the requirement in section

672(a) that removal be the result of a judicial determination has been met.[2]

b. State licensing

Section 672(c) defines "foster family home" as one which has been licensed by a state or approved by the state agency responsible for licensing. Alaska has neither licensed nor approved the foster home in which T.O. was placed. However, the Indian Child Welfare Act provides that:

> [f] or purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

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[2] On appeal, the State suggests that this requirement in section 672(a)(1) has not been met. It argues that t.O. may have been removed from his home due to a judicial determination by the tribe, or as a result of a voluntary placement agreement created when his parents consented to the village assuming custody. In either case, section 672(a)(1) would be satisfied. Moreover, the State conceded in district court that section 672(a)(1) had been met.

25 USC § 1931(b). Congress clearly intended by this section that tribal approval be recognized as equivalent to state licensing or approval. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 26, reprinted in 1978 U.S. Code Cong. & Ad. News 7530, 7549. Therefore, contrary to the district court's determination, a tribally approved foster home is the equivalent to and substitute for state approval or licensing. Section 672(c) has been complied with, since the tribal council approved T.O.'s foster home placement.

c. Agreement between Alaska and Stevens

The crux of this case is the requirement in section 672(a)(2) that a child's placement be the responsibility of a state agency or a public agency with whom the state has an agreement. Stevens concedes that there is no agreement between it and the State

regarding foster care. However, it argues that it unsuccessfully tried to negotiate such an agreement with Alaska, and that 42 USC §671(a)(4), as well as 25 USC § 1919(a) require the State to enter into an agreement. It would have us apply the equitable maxim that equity regards as being done what ought to have been done, e.g., Montana Power Co. v. Federal Power Commission, 330 F.2d 781, 788 (9th Cir. 1964), and presume that an agreement existed between the parties.

Section 671(a)(4) provides that in order for a state to receive federal funds to operate a foster care maintenance program, it must have a plan which

> provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at the State or local level assisted under Parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of federal law.

Stevens reads this section to require Alaska to coordinate its Title IV-E foster care program with the foster care program operated by Tanana and funded by the Bureau of Indian Affairs, and it maintains that coordination requires an agreement between the State and the tribe.

We disagree. Nothing in section 671(a)(4) requires the State involuntarily to enter into an agreement concerning foster care services with Stevens. Moreover, Stevens' sole evidence of a lack of coordination is the absence of an agreement between it and the State. There is no indication of competition or interference between the tribe and the State. The State declined to pay for T.O.'s foster care because he was in the tribe's custody; it did offer to accept referral of T.O. and his family and to assess their eligibility for services

offered by the State.

It is true that section 109 of the Indian Child Welfare Act authorizes agreements between states and tribes respecting the care of Indian children:

> States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

25 USC § 1919(a). But section 1919 does not require entry into state-tribal agreements - it simply authorizes them. See also, H.R. Rep. 1386, 95th Cong., 2d Sess. 25, reprinted in 1978 U.S. Code Cong. & Ad. News 7530, 7547. Examination of the statute indicates that it is permissive.

As we previously observed, states choosing to participate in the AFDC

program must conform to the requirements of the Social Security Act, as well as rules and regulations promulgated by the Department of Health & Human Services. King v Smith, 392 U.S. at 316-17. Indeed, a state risks losing federal funding if its plan for foster care does not comply with the statute. 42 USC § 671(b). Thus, the threatened loss of federal funds provides states with a powerful incentive for compliance with the mandatory requirements of the statutory scheme. When Congress wishes to compel action by a state, it does not hesitate to do so.

In contrast, neither 42 USC § 671(a)(4) nor 25 USC § 1919(a) require states and tribes to enter into foster care agreements under section 672(a)(2)-(B). These statutes are not cast in mandatory terms. It may be more consonant with the statutory spirit to

undertake such an agreement, but Congress did not provide that a state or a tribe has the right to force an agreement upon the other. For whatever reason, Alaska does not wish to negotiate an agreement with Stevens concerning foster care. As a federal court, we interpret statutes as they are written - the statutes at issue here do not mandate an agreement and it is not our role to force Alaska to enter into one. Should Stevens desire different statutory language that compels an agreement, recourse to Congress would be appropriate.

We therefore decline to infer the existence of an agreement between Stevens and Alaska under 42 USC § 672(a)(2)(B). The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF STEVENS, Plaintiff-Appellant vs. ROBERT SMITH, in his official capacity as the Commissioner of Health & Human Services, WILLIAM SHEFFIELD, in his official capacity as the Governor of the State of Alaska, and the STATE OF ALASKA, Defendants-Appellees.	#84-4431 D.C. #CV F84-0003 ORDER

Before: WRIGHT, Senior Circuit Judge, and POOLE and HALL, Circuit Judges.

The petition for rehearing is hereby denied. The mandate is ordered issued.

APPENDIX C

DEPARTMENT OF HEALTH, EDUCATION & WELFARE, SOCIAL & REHABILITATION SERVICE
WASHINGTON, D.C. 20201

SRS-APA-PS
March 3, 1969

State Letter No. 1062

TO STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

Subject: Eligibility of Indians, Including Those Living on Reservations for Assistance and Service Under Provisions of the Social Security Act

Questions have been raised which indicate States may not be clear as to the eligibility of Indians for financial assistance and services provided under the Social Security Act.

The following interpretations are aimed at resolving any uncertainty in this regard:

1. State plan provision putting into effect Articles I, IV, V, XIV, XVI, and XIX must be available Statewide to all eligible individuals. This includes State plan _____ _____ __ _ result of the 1967 legislation with reference to AFDC-_ _____ assistance, unemployed fathers, and foster care.

2. Financial assistance through the Bureau of Indian Affairs, U.S. Department of the Interior (as well as medical assistance through Indian Health Service, Public

Health Service, U.S. Department of Health, Education and Welfare (see State Letter #1031), is not available to individuals eligible for assistance from any other source.

Assistance, therefore from the Bureau of Indian Affairs, Department of the Interior, cannot be considered a basic resource in determining an individual's eligibility for a federally assisted program under the Social Security Act, since that resource is not actually available to persons eligible for the public assistance programs.

3. The Social Security Act provides that Federal sharing is available, under certain conditions when a child has been removed from his own home as the result of a judicial determination. The court or other judicial authority must have jurisdiction in such matters. Indian tribal courts and courts of Indian offenses are courts of competent jurisdiction in this respect, and are so recognized by the laws and regulations of the United States.

APPENDIX D

25 U.S.C. 1919(a) provides:

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

25 USCA 1931(b) provides:

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be

appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

42 USC 671(A)(1)-(4) & (16) provides:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which -

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for

adoption assistance payments in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at the State or local level assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provisions of Federal law; and,

(16) provides for the development of a case plan [as defined in section 675(1) of this title] for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 675(5)(B) of this title with respect to each such child.

42 USC 672(a) and (b) provide:

(a) Each State with a plan approved under this part shall make foster care maintenance payments [as defined in section 675(4) of this title] under this part with respect to a child who would meet the requirements of section 606(a) of this title or section 607 of this title but for his removal from the home of a relative [specified in section 606(a) of this title], if--

(1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made;

(2) such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 671 of this title, or; (b) any other public agency with whom the State plan approved under section 671 of this title has made an agreement which is still in effect;

(3) such child has been placed in a foster family home or child-care institution as a result of the voluntary

placement agreement or judicial determination referred to in paragraph (2); and,

(4) such child --

(A) received aid under the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or;

(B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with the relative specified in section 606(a) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been

living with such a relative and application therefor had been made.

(b) Foster care maintenance payments may be made under this part only on behalf of a child described in subsection (a) of this section who is--

(1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or nonprofit private child--placement or child-care agency, or;

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" [as defined in section 675(4) of this title].